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Supreme Court of the United States,

To October Term, A. D. 1884.

No. 1094.

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ASSOCIATION

WILLIAM H. POLLEYS ET AL., PLAINTIFFS IN ERROR,

vs.

THE BLACK RIVER IMPROVEMENT COMPANY, DEFENDANT IN ERROR.

Reply to Argument of Plaintiffs in Error on Motion to Dismiss Writ.

S. U. PINNEY,
Counsel for Defendant.

DEMOCRAT PRINTING CO., MADISON, PRINTERS AND STEREOTYPERS.

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Plaintiffs in Error,

vs.

THE BLACK RIVER IMPROVEMENT COMPANY.

By stipulation the right was secured to the defendant, to file a reply to the argument of the plaintiffs in error, in opposition to the motion to dismiss the writ of error or to affirm the judgment of the court below, and accordingly it is submitted:

First. That the question when the judgment in the action was entered is to be tried by the record and entirely so, as much as if the question were what such judgment determined. The record shows that it was signed and filed May 24, 1882, at the time when, in fact, the objections made to the proposed judgment were overruled. This is shown by the fact that notice of taxation of costs as shown by the affidavit of Smith, the clerk, was given on the 26th of May, 1882. No such notice could have been given until judgment had been rendered, and this was two years and two days before the writ of error was taken, as it was filed May 28, 1884. There is nothing,

therefore, in the affidavit of Smith to change the legal aspect of the case from what it was as presented in the original brief.

Second. The finding shows, fols. 122 and 123 of the printed statement of the record on which this motion is based, that for a distance of about a mile and a half the Black river is divided into two channels, uniting again in Rice lake, through which the river flows, and after leaving it empties its waters into the Mississippi; and under the authority of its charter the defendant as "a reasonable means of improving the navigation of the main channel, turned all its waters into that channel." Printed statement, fols. 47, 48. This is all there is of the pretense that the defendant has totally obstructed a navigable river, and stated on page 7 of the argument of the plaintiffs in error, as one of the supposed Federal questions, to support the writ of error, and the only ground for the claim of jurisdiction under this head is, "that a state has no power to authorize the *total* obstruction of the navigable rivers flowing into the Mississippi in Wisconsin." It rests upon the absurd claim that the main channel and the West Branch or Black Snake Slough, where they pass around an island, constitute two rivers.

The opinion of the court below disposes of this question upon clear and satisfactory grounds. Printed statement, fols. 35–107. The state, through a *quasi* public corporation, has simply exercised a lawful control over navigable waters, for purposes clearly beneficial and public in their character. The ownership of the state, or its interest in the navigable waters of a river for the use of the public as a highway, is paramount to the ownership of the riparian owner in its bed and shores.

The contention (foot of page 10–14, argument of plaintiff in error), that Congress has exercised any constitutional control over Black river or any part of it, in conflict with the right of the state to authorize by appropriate legislation, as in this case, all that the defendant has done under its authority, is not sustained by the Congressional legislation relied on for that purpose, or by the California and Oregon cases cited from

the Federal Reporter. 18 Fed. Reporter, 786; 19 Fed. Reporter, 347. The legislation relied on consists, 1st. Of the act providing for the sale of land in the territory northwest of the Ohio river, declaring "that all navigable rivers within the territory to be disposed of, * * * * * shall be deemed to be and remain public highways." We understand that Black River in its improved condition, according to law, and the decision of the Wisconsin court, still remains a public highway. There is nothing in the legislation of Wisconsin, or in the decision of its Supreme Court in the slightest sense, in conflict with this declaration of Congress even if now operative. 2d. Reliance is placed on the provision in the enabling act authorizing the people of Wisconsin to form a constitution and state government of Aug. 6, 1846, section 3 of which provides:

"And said river (the Mississippi) and its waters and the navigable waters leading into the same shall be common highways and forever free as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty or toll therefor." This provision is in substance the same as Sec. 1, Art. 9, of the Constitution of Wisconsin.

The Congressional legislation and the provision of the state constitution are in all essential particulars the same, as in the case of *Buckley v. Withers*, 20 How., 84, which counsel prudently refrains from noticing; while they deny that the question here presented was involved in any case cited in the original argument. See page 51 of argument and citations of Congressional legislation and state constitution there referred to. Besides in *Escanaba Co. v. The City of Chicago*, 107 U. S., 683, similar Congressional legislation in all respects existed, and it was there held that it became inoperative, upon the admission of the state of Illinois into the Union, as had been held in many previous cases cited in the original brief. See 107, U. S., 688, where it was said that:

"It is, however, contended here that congress has interfered, and by its legislation expressed its opinion as to the navigation

of Chicago river and its branches; that it has done so by acts recognizing the ordinance of 1787, and by an appropriation for the improvement of the harbor of Chicago.

The ordinance of 1787 for the government of the territory of the United States northwest of the Ohio river, contained in its fourth article a clause declaring that 'The navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between them, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor.'

The ordinance was passed July 13, 1787, one year and nearly eight months before the constitution took effect, and although it appears to have been treated afterwards as in force in the territory, except as modified by congress, and by the act of May 7, 1800, c. 41, creating the territory of Indiana, and by the act of Feb. 3, 1809, c. 13, creating the territory of Illinois, the rights and privileges granted by the ordinance are expressly secured to the inhabitants of those territories; and although the act of April 18, 1818, c. 67, enabling the people of Illinois territory to form a constitution and state government, and the resolution of congress of Dec. 3, 1818, declaring the admission of the state into the Union, refer to the principles of the ordinance according to which the constitution was to be formed, its provisions could not control the authority and powers of the state after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, *whether from the ordinance of* 1787 *or the legislation of congress, it ceased to have any operative force except as voluntarily adopted by her, after she became a state of the Union.* On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted and could be admitted only on the same footing with them. The language of the resolution admitting her is, 'on an equal footing with the original states *in all respects whatever.*' 3 Stat. 536. Equality of constitutional right and power is the condition of all the states of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same powers over rivers within her limits that Delaware exercised over Blackbird creek, and Pennsylvania over the Schuylkill river. *Pollard's Lessee v. Hagen*, 3 How. 212; *Permoli v. First Municipality*, id., 589; *Strader v. Graham*, 10 id., 82."

The attempt to distinguish this case from the one at bar on the ground that in it "the public easement in the river was not destroyed or attempted to be by a total obstruction thereof" (Argument of Plaintiffs in Error, page 13), seems to convey the idea that in the case at bar there is a total obstruction or destruction of the public easement in Black River, which the case shows is entirely untrue, one channel of it having been merely improved and made more useful at the expense of the other.

The cases of *Wallamet Iron Bridge Co. v. Hatch*, 19 Fed. Rep., 347, and of *Woodruff v. N. B. Gravel Min. Co.*, 18 Fed. Rep., 786, relied on by plaintiffs in error, are clearly distinguishable from this and all previous cases, and so are inapplicable, even if these cases can be held to have been rightly decided, for the reason that the provisions in respect to navigable waters, etc., in California and Oregon are found *in the acts admitting those states* into the Union, and not merely in *enabling acts or previous legislation*, which by an unconditional act of admission in these respects, would have been held to have been repealed as in the many cases cited in that behalf. 1 Poor's Constitutions, 208; Act of Sept. 9, 1850, sec. 3; 2 Poor's Constitutions, 1508; Act of Feb. 14, 1859, sec. 2. No such provision was contained in the act of May 29, 1848, admitting Wisconsin. 2 Poor's Constitutions, 2407. These two cases proceed upon grounds so entirely different from this case, that it would serve no useful purpose to further consider them.

Third. The point that there is anything in the fourteenth amendment to the Constitution of the United States upon which to found jurisdiction in this court, it is submitted, is scarcely plausible. That *due process of law*, and all that the phrase implies, have been observed in the proceedings of the court below is too manifest to need comment. The plaintiffs in error have had their day in court, produced their evidence been heard by counsel in all the state courts, and have been beaten on questions of purely state jurispru-

dence, and no right secured to them by the fourteenth amendment has been denied them. The fourteenth amendment does not secure to every suitor defeated in the state court, the right to come into this court and say that his constitutional rights are impaired, because he conceives the decision of the state court is erroneous. Whether the plaintiffs in error were entitled to any compensation for a supposed or alleged taking of their property, under the constitution of the state of Wisconsin, Art. I, Sec. 13, which provides that the property of no person shall be taken for public use without just compensation," was a question for the determination of the state court, and cannot be reviewed upon this writ.

Fourth. No question has ever been made in this case but that riparian rights are valuable and are property. The real question made was as to the extent of such rights, our contention being that they are subject to a superior ownership in the state, under which the defendant acted, for the purpose of subserving the public use of the river for navigation. What those riparian rights of the plaintiffs in error were, and whether they were subordinate to the interest of the state in the stream and to its use for purposes of navigation, and if so to what extent, were very clearly questions of state jurisprudence and in no sense federal. As to the facts in relation to the clump of willows and lump of mud, called lot 8, and mentioned in the argument for plaintiffs in error, reference is made to the printed statement, page 20, where the court below stated them fairly and fully. Fol. 76, *et seq.*

In remarking upon the case of *Susquehanna Boom Co. v. West Branch Boom Co*, 110 U. S., 58, it is said by counsel (argument for plaintiffs in error), page 17: "There can be no doubt, we think, that all these questions (of alleged federal law) were known or *ought to have been known* to be involved in the case;" that "*they could not be overlooked by any intelligent court.*" The fact remains, however, that it is the duty of intelligent counsel to point out to the court the questions for decision and the grounds upon which the judgment should

be given, and further, that neither of the very intelligent, able and ingenious counsel, who argued this case in the state court and who appear here, said, suggested or hinted, either at the argument of the case or of the motion for a re-hearing, that any question of federal jurisprudence was involved in the case, and probably they never suspected it.

The jurisdiction of this court of such questions on this writ is *appellate*, and every reason exists in this case for applying the rule laid down in the case just cited, 110 U. S.. 58, and for holding that unless such questions were presented and decided in the court below, this court will not entertain jurisdiction.

In conclusion, we submit that the writ in this cause should be dismissed for want of jurisdiction, or the judgment affirmed, as, if it can be maintained that any question of Federal law was involved *and decided*, such question was decided according to repeated decisions and the well settled doctrine of this court.

S. U. PINNEY,

Counsel for Defendant.

See over, page 8.